

1252.

MECHANICS LIEN LAW—DIRECTOR OF HIGHWAYS WITHOUT AUTHORITY TO WITHHOLD FUNDS DUE A CONTRACTOR ON THE GROUND THAT AN ATTEMPTED LIEN AGAINST SUCH CONTRACTOR HAS BEEN FILED WITH THE DIRECTOR OF HIGHWAYS.

SYLLABUS:

*There is no provision in the Mechanics Lien Law, (Section 8324, General Code) making the provisions thereof applicable to state funds, and the Director of Highways and Public Works is without power or authority to withhold funds due to a contractor under a contract entered into with the state for the furnishing of materials to be used in the construction, repair or maintenance of highways, on the ground that a person or company has filed with such director a statement or attempted lien, to the effect that the contractor owes to the person or company filing such statement or lien, money for work done or materials furnished in the manufacture of the materials furnished the Department of Highways and Public Works.*

COLUMBUS, OHIO, November 10, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

“We are today in receipt of a lien filed by L. L. Aller against R. H. Shafer doing business as the Ohio Road Improvement Company, Columbus, Ohio, under a contract between the parties mentioned above in which Mr. Aller claims there is due him from R. H. Shafer the amount of \$5,814.86 and demands that all subsequent bills be withheld from the said R. H. Shafer, or so much thereof as may be necessary to pay their claim.

The basis of this lien is that the said R. H. Shafer and the Ohio Road Improvement Company are furnishing this department with a ready mixed material known as T-18 and T-25 under bids taken by the purchasing agent of the department.

The A. W. Burns Construction Company represented by L. L. Aller having furnished the mixing plant and also the work and labor for unloading, mixing and reloading the materials at their plant. Mr. Aller claims the right to file this lien due to the fact that no bond is required from the Ohio Road Improvement Company by the state under the terms of the bids heretofore referred to.

Will you kindly advise me whether or not this department should honor this lien and withhold all payments to the Ohio Road Improvement Company?”

A question similar to that presented in your communication has been previously considered by this department and an opinion rendered thereon. In view of the fact that I agree with the conclusions therein reached I do not deem it necessary to present an extended discussion on the question herein propounded.

Your question involves a consideration of whether or not the provisions of Sections 8324, et seq., General Code, known as the “Mechanics Lien Law,” are applicable to public funds of the state.

In Opinion No. 3860, reported in Opinions, Attorney General, 1922, Vol. 21, page 1084, it was held:

"By reason of the amendment of Section 1208, G. C., in 109 O. L. 159, contracts entered into by the state under the state aid highway laws (Sections 1178 to 1231-7 G. C.) subsequent to the going into effect of said amendment, are not subject to lien under the provisions of Sections 8324 to 8331, G. C., or otherwise, either as to funds in the state treasury or in the county treasury applicable to such contracts."

In this instance an attempt is being made to secure a lien upon funds of the state highway department, a branch of the state government, which are due a concern that has furnished material to said department. Said material is being purchased under the provisions of a contract entered into with the State of Ohio and the holding in the opinion aforesaid is clearly applicable to the question presented herein, inasmuch as the terms of Sections 8324, et seq., General Code, are not applicable to contracts entered into by the state.

Your attention is also directed to the principle announced in *State, ex rel. Merritt vs. Morrow*, 10 O. N. P. (N. S.) 279, a case which considers Sections 8324, et seq., General Code, in which the court held in part as follows:

"1. \* \* \*

2. There are no proceedings in law whereby a mechanic's lien may be enforced against the State of Ohio.

3. The mechanic lien law, although general in its nature, and the language in the code broad enough to include public improvements of the state, does not apply to any public improvement made by the state. And any steps taken pursuant to the mechanic lien act to establish a lien or claim against funds in the hands of the state set apart for any public improvements have no effect in law and afford no ground for action either in law or equity against the state."

The above case was affirmed by the Circuit Court on October 21, 1910, by memorandum opinion.

An examination of the provisions of Sections 8324, et seq., General Code, will reveal that the legislature has not made the same applicable to the State of Ohio. It is well settled that the terms of general statutes do not apply to the State of Ohio unless such statutes expressly provide that the provisions thereof shall be applicable to the state.

In the case of the *State of Ohio, on relation of Charles Parrott, et al., vs. The Board of Public Works of the State of Ohio*, 36 O. S., 409, it was held:

"3. The state is not bound by the terms of a general statute unless it be so expressly enacted."

In this instance the material man is attempting to assert a lien against funds of the state, as stated in your communication, solely on the ground that no bond was required of the contractor conditioned to pay all material men for materials furnished in connection with the contract.

In this connection, your attention is directed to Opinion No. 62, addressed to you by this department on the 10th day of February, 1927, the syllabus of which reads as follows:

"Section 8324 of the General Code does not apply to construction work on public buildings in charge of the Division of Public Lands and Buildings, and material men, and others who have furnished material, machinery or fuel, or who performed labor in connection with the construction of such buildings

should find their remedy in the provisions of Section 2316 of the General Code.”

Although under the provisions of Section 2316 of the General Code, a contractor is required to give bond, “conditioned for the payment of all material and labor furnished for or used in the construction for which such contract is made,” we do not find a similar provision requiring such a bond for the furnishing of material to the state for road purposes when the state is making a direct purchase of said material.

In any event, the fact that there was no statute requiring the furnishing of a bond in the present instance, conditioned to pay material men, does not affect the conclusions herein reached, since it is a fundamental principle of law that general statutes do not apply to the state, unless by the express terms of such statutes the state comes within their provisions.

The holding of this department in Opinion No. 62, as hereinbefore referred to, did not turn upon the proposition that the material man had a remedy under the provisions of Section 2316, *supra*, but rather upon the broad general principle that the state could not be made a party to a suit or proceedings unless the statute so expressly provided.

Mention was made in said opinion of Section 2316 merely for the purpose of pointing out the remedy and not for the purpose of stating in any sense that Section 8324 of the General Code did not apply simply because material men in furnishing material in connection with the construction of a public building have a remedy under the provisions of Section 2316 of the General Code.

By virtue of the foregoing authorities, and answering your question specifically, it is my opinion that there is no provision in the Mechanics Lien Law (Section 8324, General Code) making the provisions thereof applicable to state funds, and the Director of Highways and Public Works is without power or authority to withhold funds due to a contractor under a contract entered into with the state for the furnishing of materials to be used in the construction, repair or maintenance of highways, on the ground that a person or company has filed with such director a statement or attempted lien, to the effect that the contractor owes to the person or company filing such statement or lien, money for work done or materials furnished in the manufacture of the materials furnished the Department of Highways and Public Works.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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1253.

PARK IMPROVEMENT—BONDS ISSUED IN SERIES—PROCEEDS OF EACH SERIES GO INTO FUND FOR ENTIRE ISSUE—HOW EXPENDITURES MAY BE MADE AND PORTIONS TRANSFERRED.

**SYLLABUS:**

*Where bonds to cover the cost of an improvement program are authorized by vote of the electors of a city and said bonds are issued in series or instalments, the proceeds of each series or instalment should be placed in a fund created for the entire bond issue. Expenditures may be made out of said fund on account of the several classes of improvements included in said improvement without regard to whether or not the amounts so expended at any time are in direct proportion to the*